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IN THE

Supreme Court of the United States

October Term, 1974

No. 73-1949

NIXON HOTEL, INC.,

Petitioner,

vs.

REDEVELOPMENT AUTHORITY OF THE CITY OF BUTLER, PENNSYLVANIA.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE COMMONWEALTH OF PENNSYLVANIA AND APPENDIX

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IN THE

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NIXON HOTEL, INC.,

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REDEVELOPMENT AUTHORITY OF THE CITY OF BUTLER, PENNSYLVANIA.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE COMMONWEALTH OF PENNSYLVANIA

The petitioner, Nixon Hotel, Inc., prays that a Writ of Certiorari issue to review the final judgment of the Supreme Court of the Commonwealth of Pennsylvania rendered in these proceedings on April 3, 1974.

Opinions Below

The Opinion of the Court of Common Pleas of Butler County, Pennsylvania, at A. D. 72, March Term, 1970, appears at Appendix A, (Pages 16-38). The Opinion of the Commonwealth Court of Pennsylvania reported at

Pa. Cmwlth. ; 315 A. 2d 366, Decided January 18, 1974, appears at Appendix B (Pages 38-48). The Pennsylvania Supreme Court denied the Petition for leave to appeal from the Commonwealth Court without Opinion, the denial appears at Appendix C (Page 48).

Jurisdiction

The judgment of the Supreme Court of Pennsylvania was entered April 3, 1974.

This petition for certiorari was filed less than 90 days from the date aforesaid. The jurisdiction of this Court is invoked under 28 USCA 1257(3).

Questions Presented

Has a property owner been deprived of Constitutional due process and equal protection guaranteed by Fourteenth Amendment to the Constitution of the United States when a Redevelopment Authority has acted in the following manner:

(1) The Redevelopment Authority condemns for the purpose of demolition without first complying with the Federal Act (42 USCA 1460(c)) which provided for the following at Page 145:

> "Notwithstanding any other provision of this subchapter, (A) no contract shall be entered into for any loan or capital grant under this subchapter for any project which provides for demolition and removal of buildings and improvements unless the Secretary determines that the objectives of the urban renewal plan could not be achieved through rehabilitation of the project area . . ."

(2) When a Redevelopment Authority permits some in a designated blighted area the privilege of self rehabilitation and makes it possible for these owners to acquire additional land to make their holdings more attractive but denies this privilege to the petitioner is this such arbitrary, capricious and discriminatory conduct among those in the same class or circumstances as to deprive the petitioner equal protection and due process under the Constitution?

(3) Though 12.8 acres within the City limits are declared to be a blighted area, the Redevelopment Authority, by its own attached charts (Appendix D, Page 49) classifies 70% of this area as not blighted, the petitioner's property being within this area; permits five properties in the area to remain; acquires adjoining land and turns it over to three of these property holders, increasing their value and attractiveness; but denies the right of self rehabilitation to the petitioner, is this such a violation of the equal treatment of all in the same class that it raises an issue of bad faith and unreasonable and arbitrary conduct on the part of the condemnor so that the property owner's Constitutional rights have been violated?

Statutory and Constitutional Provisions Involved

STATUTORY

42 USCA 1460(c) Page 145.

> "Notwithstanding any other provision of this subchapter, (A) no contract shall be entered into for any loan or capital grant under this subchapter for any project which provides for demolition and removal of buildings and improvements unless the Secretary determines that the objectives of the urban renewal plan could not be achieved through rehabilitation of the project area, . . ."

PENNSYLVANIA CONSTITUTIONAL PROVISIONS

Article I, Section 9

"Nor can he be deprived of his life, liberty, or property, unless by the judgment of his peers or the law of the land."

Article I, Section 10

"Nor shall private property be taken or applied to public use, without authority of law and without just compensation being first made or secured."

CONSTITUTION OF UNITED STATES

Amendment, Article V

"* * * No person shall * * * be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Amendment, Article XIV, Section 1

"No State * * * shall * * * deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law."

Statement of the Facts

This case has as its origin June 22, 1965, and May 2, 1967, when 12.8 acres of land in the downtown area of Butler, Pennsylvania, a mid-western Pennsylvania city with a population of over 20,000 was declared to be "blighted."

The Butler Area Redevelopment Authority, through the control and domination of its co-ordinator, director, acquired properties within the 12.8 acre area for demolition,

while at the same time it selectively and arbitrarily granted to other property owners the right to rehabilitate their buildings rather than have them torn down.

A Declaration of Taking was filed by the Butler Area Redevelopment Authority condemning for destruction the city's only Hotel, the within property, "The Nixon."

Petitioner has resisted the Declaration of Taking, filing Preliminary Objections raising the within questions at all levels of the judicial proceedings.

In the trial of the case before a jury, questions as to the determination of blight, and the bad faith, arbitrary and capricious conduct of the Condemnor, violating the statutory and Constitutional provisions applicable in the case were raised, and the Court was requested to instruct the jury as follows, to which the Court's reply is given:

Requested Instructions

"If you find the Authority in this case entered into a contract for a loan or capital grant without first having the Secretary of Housing and Urban Development, towit, Mr. Weaver's determination that the objectives of the urban renewal plan could not be achieved through rehabilitation of the project area, then this property may not be condemned for demolition." (42 USCA 1460c p. 145)

Court's Reply

"Not Applicable."

Requested Instructions

"If you find the provisions of the State or Federal law have not been complied with by the Authority, such as, failure to permit self redevelopment, failure to plan for the relocation of the business or failure to secure a determination by the Secretary of Housing and Urban Development, then the law permitting condemnation would not have been complied with and this property could not be taken."

Court's Reply

"Not law."

Requested Instructions

"If you find the Constitutional safeguards have been ignored by the Authority, such as, acquiring properties not for a public purpose but to aid certain individuals, and that the condemnee has not been treated like the other property owners in the blighted area so that the equal protection clause of the Constitution has been violated, your verdict should be for the condemnee."

Court's Reply

"Not applicable."

The only reference in the general Charge of the Court to the requirements to condemn are set forth as follows:

"The only function of the court in this matter is to see that the authority has acted not in bad faith; to see that the authority has not acted arbitrarily; to see that the authority has followed the statutory procedures in making its determination; and, finally, to see that the actions of the authority do not violate any of our constitutional safeguards within the framework of the evidence. This is what your determination will be in connection with the finding of the fact."

This was the total Charge on this point and no explanation or definition was given as to what constituted due process or equal protection.

As to the failure to secure the written authorization of the Secretary in order to condemn, the Court made this statement to the jury:

"In connection with the requirements of the statute as to whether the Authority had to have some sort of written instrument signed by the secretary of Housing and Urban Redevelopment Authority, I'm not absolutely sure of the written procedure required. The

> statute doesn't seem to set it up. The Court tells you it is of no particular consequence, because substantially the Act was complied with and the approval, whatever it might have been, to wherever it may have to go, must have been made because the money was forthcoming and the plan was consummated. I think it is one of the aspects of this lawsuit that the jury doesn't have to concern itself with."

At the end of the Charge, exceptions were specifically taken to the failure to so charge or to give any guidelines as to what was covered by the due process and equal protection clauses of the Constitution.

To the Declaration of Taking the property owner had filed Preliminary Objections raising the question of the power and the right to condemn and this issue was being tried before a jury. The question before the jury was as to whether, in fact, the area was blighted and whether the condemning authority had complied with the Federal statute when it failed to secure the consent of the Secretary to demolish the building and whether this property owner had been accorded due process and equal protection as provided by the Constitution.

As a fact the Redevelopment Authority is not permitted to condemn a property for demolition at all until it first complies with the Federal Statute (42 USCA 1460(e) Page 145) which requires the signature of the Secretary of Housing and Urban Development, certifying that the objectives could not be achieved through rehabilitation.

The Redevelopment Authority failed to show it had received this determination before starting the condemnation for the purpose of demolition.

The petitioner's Preliminary Objections went to trial in May of 1972 and a verdict was rendered for the Redevelop-

ment Authority. Motions for a New Trial being denied, the case was appealed to the Commonwealth Court of Pennsylvania.

The Commonwealth Court affirmed the lower Court on November 8, 1973, and in its Opinion stated that it agreed with the lower Court that substantial compliance with the Federal Statute (42 USCA 1460(c) Page 145) is enough; and even though the Secretary of Housing and Urban Development had not given his approval of the project it would be presumed that the public offiicals acted pursuant to proper authority. We submit the Act is mandatory and in the absence of such a showing no right to condemn exists. The power to condemn for demolition was never given, hence due process was denied.

The Commonwealth Court also summarily dismissed the petitioner's argument that it had been denied equal protection of the law and due process of law by not being offered the same right of rehabilitation as other property owners similarly situated. The trial Court in its Opinion stated its argument in one sentence: "This Court did not imply or state that a Redevelopment Authority had to offer self rehabilitation in every case."

The question of whether this 12.8 acre area was in fact blighted was central to the dispute in question, and testimony was given at trial and preserved on appeal as to whether a Redevelopment Authority has shown an area to be blighted when by its own charts and maps it classifies nearly 70% of the entire area as not blighted. The Commonwealth Court failed to note this argument at all, while the trial court in its instructions to the jury stated only that there was not any mathematical formula by which blight could be determined.

The Supreme Court of Pennsylvania refused to hear the appeal from the Commonwealth Court, and petitioner has not had determined the basic issue of whether the Constitutional guarantees of equal protection and due process have been denied him. The real issues being misconstrued by the trial court, ignored by the Commonwealth Court and refused by the Pennsylvania Supreme Court.

Reasons for Granting the Writ

In a case heard before this Court on May 13, 1974, *United States v. Giordano,* No. 72-1057, reported at U.S. ; this Court held that the failure of the Attorney General or an Assistant Attorney General specially designated by him to personally authorize an application for the interception of wire or oral communications, demanded the exclusion of evidence obtained by the unlawful interception, and ultimate acquittals of those convicted with the use of the illegal wiretaps.

In reference to the case at bar, 42 USCA 1460(c) Page 145 provides that:

> "Notwithstanding any other provision of this subchapter, (A) no contract shall be entered into for any loan or capital grant under this subchapter for any project which provides for demolition and removal of buildings and improvements unless the Secretary determines that the objectives of the urban renewal plan could not be achieved through rehabilitation of the project area, . . ."

And "Secretary" is defined at 42 USCA 1460(j):

> "Secretary means the Secretary of Housing and Urban Development."

Exhibit 33 of the Trial Court indicates that not only did the Secretary not give his determination that the Urban

Renewal Plan could not be achieved through rehabilitation of the project area, but not even one of his delegatees made this determination. In fact, the Federal Government sent large amounts of money for this Urban Renewal Project without any apparent knowledge of whether it was being used to demolish or to construct new property in the area; all contrary to what Congress by the above Statute intended. The testimony at trial clearly showed that the condemnor proposed to demolish the Nixon Hotel and this, it is contended, they cannot do without first having a finding in writing from the Secretary of HUD that the objectives of the Urban Renewal Plan could not be achieved through rehabilitation.

Congress in enacting this statute was well aware of the seriousness involved in taking property for redevelopment and in order to prevent abuse, such as the one at bar, made it clear by statute that the Secretary of Housing and Urban Development should make the final determination before a property could be condemned for the purpose of demolition.

The failure of the Redevelopment Authority in its case in chief to show it had followed the statute by having the Secretary of HUD make the determination before petitioner's property could be taken for demolition constitutes the same type of violation that this Court in *Giordano* ruled to be illegal and in violation of 18 USCA 2516(1).

When a determination is required by such an officer, the failure to secure it is fatal.

In *Schicke et al. vs. Romney*, 474 F 2d 309 (1973), the Court stated at Page 315:

> "We find that in one important respect the Secretary's decision to approve the conversion of the Gallaher Estate was deficient and, therefore, that the

> judgment of the district court must be reversed. The administrative record in this case fails to show that the Secretary has followed the mandate of the statute in certifying that the conversion-substitution involved here was consistent with any comprehensive plan which the City might have had."

In *Western Addition Community Organization vs. Romney*, 320 F. Supp. 308 (1969), the Court said at Page 315:

> "Since the statute vests the function and responsibility squarely upon the Secretary, the judicial function is narrowly limited to ascertaining whether the Secretary has made the determination required of him by law and, if so, whether he has acted in apparent good faith, reasonably rather than arbitrarily and with some factual basis for his decision."

The present case is even stronger than the *Giordano* case for requiring high officers of government, designated by Congress to oversee and protect the rights of citizens, to do just that. For, in this case, even though the duty of the Secretary of Housing and Urban Development to make determinations as to whose property will be demolished and whose may be rehabilitated, is probably a delegable duty under 42 USCA 3535(d), the determination required by the statute was not delegated, and, in fact, was not made at all.

In *Giordano*, at least a decision was made by some government official, though it proved to be an improper one. In the Nixon case, the property owner was without benefit of any Federal overseeing and consequently was deprived of due process of law.

It is difficult to distinguish this case from *Giordano* on the basis that the present case involves "property rights" rather than a criminal defendant's liberty. Both are safeguarded under the fourteenth amendment and one deserves no greater protection than the other.

It is respectfully submitted to this Court that the Nixon Hotel may not be condemned for demolition without the required finding by the Secretary of Housing and Urban Development that the area could not be rehabilitated; and to do so violated the petitioner's right to due process under the Constitution of the United States; and following the Court's reasoning in the *Giordano* case this Court should find that the taking is invalid and without authority. The Opinions of the State Courts to the contrary should be reversed until all Federal statutes have been complied with.

The Redevelopment Authority in the present case acquired properties within the area that it had certified as blighted and for a nominal price turned them over to other property owners within the district who were permitted to use these additionally acquired properties to develop and improve their existing properties which were not condemned. When the petitioner requested that he be afforded the same treatment, he was refused, with no reason being given and without any basis for distinguishing his property from: a Funeral Home; a Presbyterian Church directly adjacent to the Nixon Hotel; and a Machine Shop, all of which were allowed self-rehabilitation.

The above action of the Redevelopment Authority is hardly an emulation of the fundamental principles of equality that this Court stated a long time ago in *Duncan vs. Missouri*, 152 U.S. 377 (1894), as being essential to equality:

> ". . . and due process of law and the equal protection of the laws are secured if the laws operate on all alike, and do not subject the individual to an arbitrary exercise of the powers of government." (p. 382)

It is difficult to see in the present case how the Redevelopment Authority can classify a Funeral Home, a Machine Shop and a Church as being alike enough to allow them

the right of rehabilitation, and at the same time say that a building directly adjacent to one of the above properties and structurally as sound as any one of them should be given different treatment, and put in a separate class to be demolished. There is just no rational basis for this distinction, and about such classifying, this Court has said:

> "Under 'traditional' equal protection analysis, a legislative classification must be sustained unless it is 'patently arbitrary' and bears no rational relationship to a legitimate governmental interest." *Frontiero vs. Richardson,* 93 S.Ct. 1764 (1973), p. 1768.

When, within an area that is certified to be blighted, a governmental agency acquires some properties and condemns them for demolition, but allows others to remain and to improve themselves, all parties are not treated equally. The Federal Act (42 USCA 1460a *et seq.*), and the Pennsylvania Act (35 P.S. 703n), contemplate an "area concept" requiring the area to be condemned to be treated as a district, and all property owners within that area are to be given equal treatment. To have "spot acquisitions" within a designated blighted area as was done in this case is as invidious a discrimination, and just as unconstitutional as "spot zoning."

> "Constitutional standard under equal protection clause of the Fourteenth Amendment is whether the challenged state action rationally furthers a legitimate state purpose or interest." *McGinnis v. Royster,* 410 U.S. 263, 93 S.Ct. 1055, 1059 (1973), as quoted in *San Antonio Independent District v. Rodriguez,* 93 S.Ct. 1278 (1973), p. 1308.

It is asserted to this Court that no legitimate State purpose or interest is even inchoately existent in the action taken by the Redevelopment Authority. In *Bolling v. Sharpe,* 74 S.Ct. 693, 347 U.S. 497 (1954), this Court pointed out that:

> ". . . the concepts of equal protection and due process both stemming from our American Ideal of fairness, are not mutually exclusive. The 'equal protection of the law' is a more explicit safeguard of prohibited unfairness than 'due process of law,' and, therefore, we do not imply that the two are always interchangeable phrases. But, as this Court has recognized, a discrimination may be so unjustifiable as to be violative of due process."

The delegation of the power of eminent domain to an ever expanding group, made up of appointees of municipal subdivisions who in turn are guided, led and pushed into decisions by a so-called executive director, co-ordinator or manager who acquired his training through a few weeks of courses entitling him to be certified as a master planner, results in sudden and coerced decisions under the threat that action must be taken immediately in order to meet a deadline to secure a Grant from the Federal and State Government; and thus the property owner's rights as preserved under the Constitution are brushed aside. All of this activity aided by the presumption that governmental bodies acted pursuant to proper authority and that they properly performed every duty and met every requirement necessary or essential to the validity of the official act, which from a practical point places the property owner beyond relief.

Particularly is this true when the Court tells the jury that all statutory and Constitutional requirements must be complied with but never explains what these requirements are.

Petitioner urges that this Court review the action of the Redevelopment Authority (and the handling of the case by the trial Court) and determine whether or not the Federal Law, the Pennsylvania Law, and the protection of a property owner's rights under the United States Constitution

have been upheld with the uniformity and consistency essential to the preservation of the right to own, enjoy and control property.

Conclusions

For these reasons a Writ of Certiorari should issue to review the denial of the Petition to Appeal to the Supreme Court of Pennsylvania.

Respectfully submitted,

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Attorneys for Petitioner.

APPENDIX A

Opinion of Court of Common Pleas of Butler County, Pennsylvania, Filed March 14, 1973

IN THE

COURT OF COMMON PLEAS

OF BUTLER CO., PENNSYLVANIA

IN RE: CONDEMNATION BY REDEVELOPMENT AUTHORITY OF THE CITY OF BUTLER FOR THE PURPOSE OF CARRYING INTO EFFECT A PROPOSAL FOR THE REDEVELOPMENT OF THE REDEVELOPMENT AREA (SOUTH MAIN STREET PROJECT NO. PA. 290) NIXON HOTEL, INC.

A. D. 72 March Term, 1970.

OPINION AND ORDER.

FILSON, *J.*, Specially Presiding, 18th Judicial District.

HISTORY OF CASE.

On June 22, 1965, the Butler City Planning Commission certified by resolution a certain area of 3.47 acres, more or less, as a "Blighted area" known as the South Main Street Urban Renewal Area. The said parcel was certified to the Redevelopment Authority of the City of Butler as a Redevelopment Area as defined by the Urban Redevelopment Law: (See Plaintiff's Exhibit #1).

In July of 1966, the Redevelopment Authority prepared a Redevelopment Proposal and Redevelopment Area Plan.

The aforesaid consisted of an area of 12.8 Acres, which included the 3.47 Acre tract already certified as blighted: (See Plaintiff's Exhibit No. 12).

In July of 1966 there was also prepared an Urban Renewal Plan which plan was later recorded on March 18, 1969, in the office of the Recorder of Deeds in Butler County in Deed Book, Volume 901, pages 883 to 905. The Urban Renewal Plan contained 12.8 Acres as set out in the Redevelopment Proposal and Redevelopment Area Plan: (See Plaintiff's Exhibit No. 13).

On the 23rd day of January 1967, the Butler City Planning and Zoning Commission certified by resolution as a "blighted area" the above mentioned area of 12.8 Acres, which was set out in the Redevelopment Proposal and Redevelopment Area Plan and the Urban Renewal Plan dated July 1966, and certified by resolution to the Redevelopment Authority of the City of Butler the 12.8 Acres as a "Redevelopment Area": (See Plaintiff's Exhibit No. 2). According to the evidence the professional consultants for the Planning and Zoning Commission of the City of Butler was the firm of Simonds and Simonds of Pittsburgh, Pennsylvania.

On March 14, 1967, the Redevelopment Authority by resolution approved the said Redevelopment Proposal and Redevelopment Plan, and submitted same to the Butler City Planning and Zoning Commission and to the governing body of the City of Butler: (See Plaintiff's Exhibit No. 5).

On the same date the Redevelopment Authority passed a resolution approving the Urban Renewal Plan and the

conditions under which relocation payments were to be made, which resolution *inter alia* found and determined that the objectives of the Urban Renewal Plan cannot be achieved through rehabilitation of the property area: (See Plaintiff's Exhibit No. 6).

On March 30, 1967, the Planning and Zoning Commission of the City of Butler approved by resolution the Redevelopment Area Plan and by resolution certified its approval to the City Council of the City of Butler and further approved the Urban Renewal Plan: (See Plaintiff's Exhibit No. 3).

On May 2, 1967, the Council of the City of Butler by resolution, after public hearing held pursuant to notice, approved the Redevelopment Proposal and Redevelopment Area Plan and by further resolution of even date approved the Urban Renewal Plan, and entered into a cooperation Agreement with the Redevelopment Authority of the City of Butler: (See Plaintiff's Exhibits Nos. 9, 10, 11).

During the time related above the Redevelopment Authority in cooperation with the Department of Housing and Urban Development, of the United States Government filed certain applications and other documents which was concluded by a Loan and Grant Agreement between the Department of Housing and Urban Development which was executed on the 28th day of December 1967. The contract consisted of two parts: (See Plaintiff's Exhibits Nos. 17, 33 and 34).

Meanwhile negotiations for acquisition of the Nixon Hotel property having failed, the Redevelopment Authority, at a special meeting on December 29, 1967, passed a resolution

to condemn the Nixon Hotel property which is situate within the Redevelopment Area: (See Plaintiff's Exhibit No. 7).

On December 31, 1969, the Redevelopment Authority filed a Declaration of Taking to condemn the Nixon Hotel, Inc. property. The property was condemned pursuant to the Act of May 24, 1945, P. L. 991 as amended, which condemned property was a part of the South Main Street Project No. Pa. 290.

Thereafter the Condemnee filed Preliminary Objections raising the questions of the power and right of the condemnor to appropriate, the sufficiency of security and the procedure followed.

The Condemnee alleged in its Preliminary Objections that the bond of $50,000 was inadequate; that the Authority lacked the power to take, being in violation of the provisions of both the State and Federal Constitutions; that the Authority acted in bad-faith, unreasonably, arbitrarily, capriciously and discriminatorily and abused its power.

On February 24, 1970, the Condemnee filed a Demand and Motion for a Jury Trial on the issues of fact to take place prior to the determination of damages by Viewers or otherwise.

These matters were heard on argument by the Honorable J. Frank Graff, P. J., 33rd Judicial District, Specially Presiding, and the matter was accordingly disposed of by the Opinion and Order of Court filed April 29, 1970, disposing of the matters involved.

Appendix A—Opinion of Court of Common Pleas of Butler County, Pennsylvania, Filed March 14, 1973

The matter of the constitutionality of the Eminent Domain Code was noted in the opinion as follows: "It is first to be noted here that the condemnee raises the question of the constitutionality of the Eminent Domain Code of 1964, in that it does not provide for a full and complete method of allowing damages which may be sustained. In *Valley Forge Golf Co. vs. Upper Marion Twp.*, 422 Pa. 223, 230, the Court states as follows:

> 'We are satisfied that the Eminent Domain Code fully protects the rights of the property owner and guarantees to him the constitutional safeguards to which he is entitled, including appropriate appellate review.'

Bearing particularly upon the question of damages allowed, the Supreme Court, in *Singer v. Oil City Redevelopment Authority*, 437 Pa. 55, adopted an Assembled Economic Unit Doctrine as a supplement to the Eminent Domain Code. This case answers the condemnee's objection to the constitutionality of the Act and contrary to its contention."

The disposition of the matters involving the constitutionality of the matters were therefore disposed of by the opinion noted above.

Subsequent to the date of the filing of the Court's Opinion the Defendant moved to amend the preliminary objections by adding sub-paragraph 1 (a) under Par. II as follows:

> "The authority, in making its certification, acted in bad-faith and arbitrarily in that the area taken was certified as a blighted area, when in fact it was not blighted."

Appendix A—Opinion of Court of Common Pleas of Butler County, Pennsylvania, Filed March 14, 1973

This amendment was allowed by the Court, and the Order was as follows:

> "And Now, July 14, 1970, a petition having been presented asking leave to amend the preliminary objections by adding Sub-Paragraph 1 (a) under Paragraph II, said amendment is allowed, the effect thereof being that the entire area is alleged to be a blighted area. The order heretofore made allowing a jury trial is now reaffirmed and it is directed that a new bond be filed without any limitation on the power of attorney."
>
> By the Court,
> S/ J. Frank Graff, P. J.
> Thirty-third Judicial District
> Specially Presiding.

A Pre-Trial Conference was held in Chambers before the Honorable George P. Keister, of the Court of Common Pleas, in and for Butler County, Pennsylvania, on January 25, 1972, and at that time trial time was estimated to be two days.

On May 1, 1972, a jury was empanelled and the case came on for trial the following day. A Motion for a view was made by the Condemnor. After a personal examination of most of the buildings not yet cleared, the Court dismissed the motion and ruled that an examination of the buildings would be unduly prejudicial, since they had been vacated and fallen into a state of disrepair, not compatible with their condition at the time they had been taken over by the Authority. The matter of safety for the jury was also considered by the Court.

Appendix A—Opinion of Court of Common Pleas of Butler County, Pennsylvania, Filed March 14, 1973

The Court did, however, direct a tour of the entire redevelopment area without examination of any of the buildings not yet disposed of.

Testimony was taken on the 2nd and 3rd of May and was continued until the 16, 17 and 18th day of May. The case was then continued until the 23rd day of May, at which time argument of counsel was made before the jury and Court and the charge to the jury was then made.

The jury returned a verdict in favor of the Redevelopment Authority.

ANSWER TO CONDEMNEE'S OBJECTIONS
RE: MOTION FOR NEW TRIAL.

The Condemnee filed a Motion for a New Trial and Judgment *N.O.V.* on June 1, 1972, alleging certain errors in the trial of the case and instructions to the jury.

1. The first reason advanced by the Condemnee, that the verdict is against the weight of the evidence, is dismissed as being without merit.

2. The second reason advanced by the Condemnee, that the verdict is against the law of the case, is dismissed as being without merit.

3. The third reason advanced by the Condemnee for a new trial is dismissed as being without merit.

4. The fourth reason advanced by the Condemnee is dismissed as being without merit. In the pre-trial order, trial time was estimated at two days. After the first day of trial it being apparent that the trial would be of more

duration, the Court set the dates for trial in deference to the availability of counsel, the witnesses and the Court.

5. Condemnee charges that the Court erred in defining bad-faith as denoting something ulterior, when in fact, the Condemnee meant that bad faith was merely a wilful failure to perform a plain and well understood obligation, such as, the failure to allow the Condemnee to repair and rehabilitate its building. However, I would point to Condemnee's *Points For Charge* No. 11 wherein it is stated in part, "Bad Faith implies a tainted motive or interest."

6. (a) This reason advanced in support of a new trial is dismissed as being without merit.

(b) It is also the contention of the Condemnee that the Court erred by not permitting certain opinion evidence offered in its behalf.

The owner-condemnee placed three witnesses on the stand to give an opinion as to whether the area was blighted.

Howard Warnick, a registered civil engineer, was the first witness asked to give his opinion as to whether the Redevelopment Area was in fact blighted. The testimony secured on direct examination revealed that Mr. Warnick was a graduate engineer of Carnegie Institute of Technology in 1934. That he has been a registered engineer since 1947 and that he has had his own engineering firm in the City of Butler since that date.

On cross examination it was disclosed that Mr. Warnick was not acquainted as to whether there were sanitary or unsanitary conditions in the Redevelopment area (N.T.

292); that he did not make an investigation of the area as such (N.T. 294); that he was not certified as a planner (N.T. 296); that he had never made a determination of blight (N.T. 297); and admitted that he would not be able to make determinations of land use elsewhere without previous experience.

The apparent purpose of the testimony was to elicit an opinion predicated upon percentages of properties alleged to be not blighted as opposed to properties alleged to be blighted.

It is to be noted that the meaning of blight for this purpose was established in accordance with a determination made by a witness for the Condemnee and did not include blighting influence which is a necessary factor to be used in such determination and, therefore, in the Court's opinion was of no value in arriving at the ultimate question of whether the area was blighted. Other factors were likewise not taken into consideration, such as, land use, availability of light and air, and overcrowding. The Court feels that blight is not a matter by which such a determination may be made.

Counsel for the Authority objected to Mr. Warnick giving an opinion as to blight, and the Court sustained the objection.

The Court held for the above reasons that Mr. Warnick was not qualified as an expert and disallowed the offer of his opinion.

Mr. Royston Powell was the next witness offered as an expert. He is a professional registered architect since

1939. He is associated with the Warnick Company since 1947. His testimony revealed that he had done considerable work for the Nixon Hotel. However, the testimony showed that he was not a certified planner (N.T. 354); that he never investigated the 12.8 acres known in Butler as the South Main Street Urban Renewal Project (N.T. page 355); that he never made an examination of it (N.T. 355); that he would not presume that anybody can look from the interior or exterior of a building and determine it to be deficient in any way (N.T. page 355); that his sole experience in the project area was with the Nixon Hotel (N.T. page 355); that the last work he did for the Nixon Hotel was in 1960. Counsel for the Authority objected to the offer of his opinion as an expert and the Court sustained the objection.

Counsel then proposed a hypothetical question for the witness and the Court, likewise, disallowed it for the reason that in addition to the witness not being qualified the hypothetical question did not contain sufficient information to be meaningful.

C. Stewart Shoemaker, principal stockholder and operator of the Nixon Hotel, Inc., testified in behalf of the Condemnee corporation. Counsel asked the witness his opinion as to whether the area was blighted and upon objection by counsel for the Authority, the Court sustained the objection.

Counsel for the Condemnee argued to the Court that under the Eminent Domain Code there is a provision for a land owner to testify as to his opinion of the value of his property, and he should, therefore, be able to testify

as to the caliber of the district in which his property is located (N.T. page 333). The Court ruled upon objections that the witness could not properly give his opinion as to whether the area was "blighted."

There was no attempt to qualify this witness as an expert, nor was there any evidence that he had any specialized knowledge or experience to qualify. Further, there was no testimony respecting his knowledge of the area nor the conditions prevailing therein.

(c) The Condemnee attempted to show that it had plans for self-rehabilitation and contends that the Court erred in refusing to permit the architect to identify and explain the plans which had been prepared for self-rehabilitation. The plans had been prepared *circa* 1960 and it is the opinion of the Court that they were too far removed in point of time to be relevant. Nor does the Court believe that they were germane to the issues.

Self-rehabilitation could be completely incompatible with a Redevelopment Plan, nor was there any evidence offered to indicate that any proposed self-rehabilitation in this case was likely to enhance the Redevelopment Plan, which necessarily includes the entire area.

(d) Condemnee contends that there was error on the part of the Court in failing to instruct on a duty or privilege of self-rehabilitation. The Urban Redevelopment Law is intended to give wide scope to municipalities in redesigning and rebuilding such area within their limits as, by reason of the passage of years and the enormous changes in traffic conditions and types of building construction, no

longer meet the economic and social needs of modern city life and progress: *Scheneck v. Pittsburgh et al.*, 364 Pa. 31.

Self-rehabilitation in a clearance plan could be the very antithesis of essential quality of the plan and the Redevelopment Authority has a wide range of discretion in respect to such a plan as long as it does not act in bad faith.

(e) The Condemnee has objected to violations of his constitutional rights of "due process" and equal protection.

There is no question that all persons are entitled to the constitutional safeguards of "due process" and "equal protection of the law", as provided in both the State and Federal Constitution. The Condemnee points out that the taking must be for a public use and contends that the taking of the Nixon Hotel property was not for such use. The Courts have held that the taking of property for eliminating blight is a public purpose.

The taking of property by Redevelopment Authorities under Section 12 of the Act of 1945, May 24, P. L. 991, for the purpose of eliminating and rehabilitating blighted sections of municipalities is a taking for a "public use" within constitutional provision respecting eminent domain: See, *Belovsky vs. Redevelopment Authority of City of Philadelphia*, 357 Pa. 329. It is the taking for the purpose mentioned which makes the taking one for a public use.

The jury found for the Redevelopment Authority in reference to this issue of blight and, therefore, the taking was of a blighted area and the taking was for the purpose of eliminating the blight, hence taking for a public use.

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It is the Complaint of the Condemnee also that the Condemnee did not receive "equal protection" in the application of the law and that others received different treatment from the Redevelopment Authority. The Condemnee is guaranteed equal treatment under the law and in so far as possible received such treatment from the Authority. The Condemnee is still in possession and has his day in court. In so far as it can possibly be accomplished, the Condemnee has received equal protection and the jury found the Redevelopment Authority was not guilty of bad faith, capriciousness, etc.

The fact that the Authority was not guilty of bad faith, etc., and the fact that the area was determined to be blighted, sanctioned the conduct of the Authority in its determination of blight and because there may be some features of private gain does not transgress the "equal protection" clause. Whether the "equal protection" clause was violated was not a matter for the jury.

The retention of some of the properties by the original landowners was compatible with the Redevelopment of the area and the Land Use provision of the Urban Renewal Plan.

The Court is of the opinion that no constitutional rights of the Condemnee were violated either under the State or Federal Constitution.

(f) The contention that the Court should have construed for the jury the meaning of the contract between the United States Government and the Redevelopment Autho-

rity is without merit: (Exhibits 33 and 34). The contract represents an agreement between the two parties who are privy to the instrument. The standing of any other party to complain about the contents of that agreement is not relevant.

The contents of the contract referred to had no relevancy to the issues raised by the preliminary objections and was not a matter for any determination by the jury.

In general, the construction of a written instrument is the exclusive province of the Court and should not be submitted to the jury: P.L.E. Vol. 38, page 146, and any explanation of the contract to the jury would be improper.

(g) Condemnee also complains that the Court erred in failing to define blight. The Act describes the Legislative intent in respect to the elements of blight and the charge of the Court embodied the "Findings and declaration of policy of the Legislature in respect to blight." The elements set out in the Act, 35 P. S. 1701 delineate the matters and conditions which represent blight.

(h) There is no authority either Federal or State which requires a duty on the part of the Redevelopment Authority to permit self-rehabilitation, and the Court is of the opinion there is no merit in this objection.

(i) This objection of the Condemnee is likewise without merit. The determinations required by the Secretary of HUD prior to any demolition as is set out in the paragraph which follows Paragraph (10) of 42 USCA 1460 is not a matter for the jury. In fact the determinations required

are set out in the Loan and Capital Grant Contract (Pl. Ex. 33) and the Loan and Capital Grant Contract Part II (Pl. Ex. 34) which together represent the entire contract, (See Pl. Ex. 33, Part I, Page 1, first paragraph). In Part II, page 2 Sec. 101 (B) it states "and the Secretary has made such determinations and certifications as are required to have been made by him pursuant to Section 101."

The Urban Renewal Plan sets out on Page 1 of 14 Sec. 2 a (1) (Exhibit 13) that approximately 80% of the total number of structures will be removed. The Secretary had knowledge of the demolition as indicated and the contract was properly entered into because such determination of the type of project was made as shown in Part II of the Contract (Exhibit 34) Page 2, Sec. 101 (B).

Any deficiencies in respect to the Contract entered into is a matter between the parties and the Condemnee has no right to complain. Furthermore, it is the opinion of the Court that the matters are all merged in the contract executed between the United States Government and the Redevelopment Authority. It is, therefore, the opinion of the Court that the Condemnee has no standing to complain.

DISCUSSION.

The questions raised by the Preliminary Objections fall into three categories as follows:

I. Adequacy of the bond.

II. That the Authority lacks the power to take. This reason was subsequently amended by motion which added

sub-paragraph (a) to Paragraph 1 of category II of the Preliminary Objections, alleging the Authority Lacks The Power To Take, which reads, "The Authority acted in bad faith and arbitrarily in that the area taken was certified as a blighted area when in fact it was not blighted."

III. That the Authority acted in bad-faith, unreasonably, arbitrarily, capriciously, discriminatorily, and abused its power.

The first objection above was resolved in the Opinion and Order of the Honorable J. Frank Graff, specially presiding, wherein he directed that a new bond be filed without any limitation on the power of attorney.

In respect to the second objection, Judge Graff in his opinion pointed out that the Eminent Domain code is constitutional, however, the determination of the issue as to whether the area is in fact blighted must be resolved before a jury prior to the Condemnor's taking by Eminent Domain.

The first question, therefore, for the jury was whether the Redevelopment Area was in fact blighted.

The other question for the jury is in respect to the objection by the Condemnee that the Authority acted in bad-faith, unreasonably, arbitrarily, capriciously and discriminatorily and abused its power.

The statute does give a Redevelopment Authority the Power of Eminent Domain as provided by the Urban Redevelopment Law of 1945, May 24, P. L. 991, Sec. 9 as

amended. The power is given, "To acquire by eminent domain any real property, including improvements and fixtures for the public purposes set forth in this Act, in the manner hereinafter provided, except real property located outside a redevelopment area".

It is the contention of the condemnee that the area was not blighted and that the Authority acted in bad-faith, unreasonably, arbitrarily, capriciously, and discriminatorily and abused its power and, therefore, for those reasons did not have the power to take.

Since the jury found in favor of the Redevelopment Authority on both of the matters noted in the paragraph above then it seems to follow that the Authority does have the right to exercise its power to take and that, therefore, the taking is proper, and it is for the Authority to decide whether eminent domain power should be exercised in the particular instance: Oliver vs. City of Clairton, 374 Pa. 333.

Once the power to take is determined to be proper the power may be exercised by the Authority. However, the exercise of such power must be for a public purpose. The Condemnee objects that the taking was not for a public purpose, however, the area was found to be blighted and Eminent Domain is authorized by a Redevelopment Authority under the Act of May 1945, P. L. 991, Sec. 9, as amended and the taking was proper, for the reason that the taking was to eliminate blight. The taking of property, under the Urban Redevelopment Law for purpose of eliminating and rehabilitating blighted sections of municipalities is a taking

for a "public use" within constitutional provisions respecting Eminent Domain: Belovsky vs. Redevelopment Authority of Philadelphia, 357 Pa. 329, Schenck vs. City of Pittsburgh, 364 Pa. 31. Nor does it lose its public character because there may exist in the operation some feature of private gain: *Belovsky vs. Redevelopment of the City of Philadelphia,* 357 Pa. 329.

The question of blight and bad-faith, etc. having been resolved in favor of the Authority, it appears to the Court that the Constitutional objections of the Condemnee are likewise resolved.

In respect to Section III of the Preliminary objections, the objections set out thereunder were answered by the finding of the jury in favor of the Authority. In respect to the contention by the Condemnee that self-rehabilitation must be permitted, the Court believes that this matter is for the discretion of the Authority and is not mandated by the Act.

The problem with self-rehabilitation in an area for which there is a rehabilitation plan, is the risk of self-rehabilitation being incompatible with the overall plan.

In this case we are concerned with an area and not any one individual building. It is the area which is involved and not the blight or non-blight of any particular building, however, when the Condemnee complains about not being permitted to pursue a self-rehabilitation program, there is an inference that such property may have some shortcomings. It is the position of the Court that the condition

of one building is not relevant, it is the entire area which must be considered.

In order to certify an area as blighted it is not necessary that each and every one of the conditions which cause areas to become blighted, as specified in the Act of 1945, P. L. 991 Sec. 2, as amended, should exist, but existence of any one of such conditions is sufficient to warrant certification and adoption of a redevelopment project: *Oliver vs. City of Clairton,* 374 Pa. 333.

It should also be noted that the Urban Redevelopment Law is intended to give wide scope to municipalities in redesigning and rebuilding such areas, within their limits or, by reason of the passage of years and the enormous changes in traffic conditions and types of building construction, no longer meet the economic and social needs of modern city life and progress: *Schenk vs. Pittsburgh et al.,* 364 Pa. 31.

It should, likewise, be pointed out that there is a strong presumption that in exercising municipal powers, municipal governing body has not abused its discretion but has acted in good faith.

OPINION

There are two questions to be resolved in the present case which were for the determination of the jury.

First, is the question of whether or not this Redevelopment Area of 12.8 acres was a "blighted area."

Second, is the question of whether the Authority acted in bad faith, unreasonably, arbitrarily, capriciously and discriminatorily and abused its power.

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The first and second questions were for the jury and a verdict was returned for the Redevelopment Authority thereby finding that the area was blighted and that the Authority did not act in bad faith, unreasonably, arbitrarily, capriciously, discriminatorily not abuse its power.

In order for a city planning commission to certify an area as blighted it is not necessary that each and every one of the conditions which cause areas to become blighted, as set out in the Act of 1945, May 24, P. L. 991, Sec. 2, as amended, should exist, but existence of any one of such conditions is sufficient to warrant certification and adoption of a Redevelopment Project: *Oliver vs. City of Clairton*, 374 Pa. 333.

The fact that there are some properties, within an area found to be blighted, which are free from blight does not make the action in finding the area blighted arbitrary, because comprehensive planning requires that areas be considered in their entirety and not in their unseverable parts: *Crawford vs. Redevelopment Authority*, 418 Pa. 549. It was the entire area which has to be considered in this case and the jury was so instructed.

There is no question but what a Redevelopment Authority has the power to condemn: Act of 1945, May 24, P. L. 991, Sec. 9 and Sec. 12 as amended, and the Courts have said it is for the Redevelopment Authority and not for the Courts to determine whether eminent domain power should be exercised in a particular instance: *Oliver vs. City of Clairton*, 374 Pa. 333.

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However, whether an Authority acts in good faith is for review by the Courts and in this case the question of good faith, etc., was submitted to the jury pursuant to the preliminary objections. In the absence of indication that authority did not act in good faith, or was wholly arbitrary in certifying an area designated by it as blighted, or failed to follow a statutory requirement, certification to effect the area is blighted is not subject to judicial review: *St. Peter's Roman Catholic Parish vs. Authority,* 394 Pa. 194.

It is presumed, however, that officials have performed their duties in good faith; and the burden to prove the contrary is on the Condemnee and the burden of proving bad faith, arbitrariness, etc., is a heavy one: *Pittsburgh School District Condemnation Case,* 430 Pa. 566. The matter of bad faith, etc., was submitted properly to the jury which found in favor of the Authority.

In respect to condemnation the take must be for a public use. In the instant case the jury found that the area was blighted and that the Authority did not act in bad faith, nor capriciously, etc. Since the jury found for the Authority on both counts, then it follows that the Authority had the right to condemn.

However, condemnation must be for a public purpose. This public purpose is served in taking the property for the purpose of eliminating and rehabilitating blighted sections. The elimination of blight through planning and redevelopment of the area is a public use: *Belovsky vs. Redevelopment Authority of Philadelphia,* 357 Pa. 329.

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It is the opinion of the Court that all the issues were properly and fairly presented to the jury and that the testimony permitted to go to the jury was proper and that the testimony disallowed was not proper for the jury.

The Constitutional guarantees due the Condemnee were adequately protected and that the matters of law were properly reserved to the Court.

ORDER.

And Now, this 6th day of March 1973, after due consideration the Court denies the motion for new trial and judgment *N. O. V.*

BY THE COURT,
ROBERT B. FILSON,
18th Judicial District.
JOHN C. DILLON,
50th Judicial District.

Eo die, Exceptions granted Condemnee.

BY THE COURT,
ROBERT B. FILSON,
18th Judicial District.
JOHN C. DILLON,
50th Judicial District.

APPENDIX B

Opinion of Commonwealth Court of Pennsylvania, Filed January 18, 1974

IN THE

COMMONWEALTH COURT OF PENNSYLVANIA

NIXON HOTEL, Incorporated,

Appellant

v.

REDEVELOPMENT AUTHORITY OF THE CITY OF BUTLER,

Appellee.

No. 468 C. D. 1973.

Before: Honorable James S. Bowman, *President Judge.*
Honorable James C. Crumlish, Jr., *Judge.*
Honorable Harry A. Kramer, *Judge.*
Honorable Roy Wilkinson, Jr., *Judge.*
Honorable Glenn E. Mencer, *Judge.*
Honorable Theodore O. Rogers, *Judge.*
Honorable Genevieve Blatt, *Judge.*

Argued: November 8, 1973

Certified from the Record Jan 18 1974.

FRANCES C. BARBUSH,
Chief Clerk.

(SEAL)

Appendix B—Opinion of Commonwealth Court of Pennsylvania, Filed January 18, 1974

OPINION BY PRESIDENT JUDGE BOWMAN

Filed January 18, 1974

Appellee, Redevelopment Authority, filed a declaration of taking under the Eminent Domain Code[1] in Butler County to which the appellant, Nixon Hotel, Incorporated, filed preliminary objections raising the questions of the sufficiency of appellee's bond, appellee's right and power to take and the procedure followed by appellee, alleging bad faith, unreasonable, arbitrary and capricious action.

Following the filing of an answer to appellant's preliminary objections, the appellant moved for a jury trial on the preliminary objections, which was granted. To this order appellee appealed to the Supreme Court, which appeal, on appellant's motion, was quashed.

Trial was held on the issues raised by appellant's preliminary objections and a verdict was returned for the appellee. After motions for Judgment *N. O. V.* and for a new trial were denied, appellant appealed to this Court. Numerous issues are presented by this appeal, and since we find them without merit the order of the lower court will be affirmed.

The Nixon Hotel property is located within a 12.8 acre area that was certified as blighted by resolution of the Butler City Planning Commission and Zoning Commission on January 23, 1967.[2]

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[1] Act of June 22, 1964, Special Sess., P. L. 84, 26 P. S. § 1-201 *et seq.*

[2] Urban Redevelopment Law, Act of May 24, 1945, P. L. 991, § 9, *as amended*, 35 P. S. § 1709(i) (k).

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After appropriate notice and public hearing, the Council of the City of Butler approved by resolution the Redevelopment Proposal and Redevelopment Area Plan submitted by the Authority as required by law.

Negotiations for acquisition of the appellant's property by the appellee having failed, the appellee then passed a resolution condemning appellant's property and filed its declaration of taking.

The trial on appellee's preliminary objections commenced on May 3, 1972, was continued until May 16, 1972, and proceeded on May 17 and 18, 1972. On May 18, 1972, the trial was adjourned until May 23, 1972, on which day the trial was concluded with closing arguments and the court's charge. Appellant's initial contention is that the delays and adjournments conveyed the impression to the jury that case was unimportant and due to the complexity of the issues a just decision could not have been rendered.

The record reveals that the trial judge repeatedly advised the jury of the importance of the case, and there is nothing in the record to suggest that the jury believed otherwise. Furthermore, the record reveals that in the pre-trial conference the estimated time of the trial was two days. That it considerably exceeded this estimate is no one's fault, rather the delays were unforeseeable necessitating the adjournments. We cannot say that two adjournments under these circumstances was unreasonable or that the trial judge abused his discretion. *Plow City*, 122 F.2d 816 (3rd Cir. 1941), *cert. denied*, 315 U. S. 798 (1942), cited by the appellant, is inapposite.

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The appellant next contends that the trial judge failed to properly instruct the jury as to the burdens of proof required by the appellant and the appellee. Two issues were submitted to the jury for their consideration. The first issue was whether the redevelopment area was blighted as the Authority had certified, and the second issue was whether the Authority acted in bad faith.

As to the question of the power and authority of appellee to condemn, a proper issue is whether the area in question was, in fact, blighted. *Faranda Appeal,* 420 Pa. 295, 216 A.2d 769 (1966). And such an issue is properly raised by preliminary objections to a declaration of taking. The burden of proving that the area was in fact blighted is on the Authority.

As regards the second issue of bad faith, the appellant has the burden of proving this allegation and the burden is a heavy one. *Pittsburgh School District Condemnation Case,* 430 Pa. 566, 575, 244 A.2d 42, 46 (1968).

Addressing itself to the issues of burdens of proof and presumptions, the trial judge states (R. 435a-437a):

> "I think I should also point out to the jury that there is a strong presumption that in exercising municipal powers, municipal governing body has not abused its discretion, but has acted in good faith. That is only a presumption, but it can be overcome by other facts."

As regards the parties' burdens of proof:

> "In this case it is incumbent upon the Redevelopment Authority to establish that the area is blighted. *In other words, the Authority has the burden of proof in showing the area to be blighted.*

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"In respect to the contention of the Nixon Hotel Incorporated, it charges that the authority acted in bad faith, unreasonably, arbitrarily, capriciously, discriminatorily and abused its power. *It is the burden of the Nixon Hotel to establish these allegations of bad faith,* unreasonableness, arbitrariness, capriciousness and discrimination. . . ." (Emphasis added.)

"From all of the testimony, what the jury is going to have to determine really boils down to two things:

"Number One: Whether the project area was blighted.

"It is incumbent upon the plaintiff, which is the Redevelopment Authority in this case, to prove *by a preponderance of the evidence* that the entire project was blighted.

"Now whether the other actions were arbitrariness, bad faith, unreasonableness, capriciousness and so on in respect to the entire project area, the burden of proving that is on the Nixon Hotel. *They must do this by the preponderance of the evidence likewise.*

"*But this burden here is a heavy one,* because of the fact that such allegations of bad faith and so on are made which certainly have a connotation of something ulterior." (Emphasis added.)

It is difficult to see how the trial judges could more clearly have delineated the issues in this case. That the varying burdens of proof are explained consecutively rather than at different instances in the charge serves to clarify not obfuscate the issues. The jury is better able to appreciate the distinction between the two burdens.

Appellant next contends that the trial court committed error in sustaining appellee's objections to appellant's "expert" witnesses testifying on the issue of blight. Whether or not to permit a witness to testify is discretionary with

the court. *Laubach v. Haigh,* 433 Pa. 487, 491, 252 A.2d 682, 683 (1969). And the trial court will not be reversed unless there is a clear abuse of discretion. *Laubach v. Haigh, supra,* 433 Pa. at 491, 252 A.2d at 683.

A review of the record reveals that none of appellant's proposed expert witnesses qualified as an expert so as to express an opinion on the question of blight. Mr. Warnick was the appellant's first expert, a registered professional engineer. This witness on cross-examination, while stating that he was familiar with the area, admitted he had never studied or investigated the area. Furthermore, he admitted he was not a certified planner and that he had no experience in the field of planning and zoning or development.

Mr. Powell, a registered architect in Pennsylvania, was appellant's next proffered expert. Mr. Powell testified that the last project he worked on in the area was in 1960. The court held that this was too remote in time and sustained appellee's objection to qualifying him as an expert.

Finally, the appellant called Mr. Shoemaker, the owner of the Nixon Hotel. Mr. Shoemaker testified as to the improvements he made on the hotel, the last renovation being in 1968. The trial judge did not permit him to express his opinion on the issue of blight.

From a review of the record, we cannot say that the trial judge abused his discretion in not permitting appellant's witnesses to express their opinions as to blight. None of the witnesses had made a current evaluation of the area for the purpose of determining blight.

Appellant next argues that there has been an unlawful delegation of the power of eminent domain by the appellee to

its development coordinator, Mr. Kaplan, citing *Faranda Appeal, supra.*

An examination of *Faranda Appeal,* reveals that it is clearly distinguishable from the case at bar. In that case the lower court dismissed appellant's preliminary objections without making a determination that the area was in fact blighted. The Supreme Court reversed and remanded with directions to the lower court to make a determination as to whether the area was in fact blighted.

In the instant case, the lower court has taken testimony and a jury has determined that the area is in fact blighted.

The appellant also contends that the appellee is required to permit the appellant self-rehabilitation. In *Redevelopment Authority of the City of Erie v. Owners or Parties in Interest,* 1 Pa. Commonwealth Ct. 378, 394, 274 A.2d 244, 252 (1971), this Court stated:

> "We conclude that (1) the pressure exerted on the redeveloper; (2) the modification of the redevelopment plan to the prejudice of the plan; (3) the refusal to permit appellants to eradicate the blighted condition of their property and (4) the understanding with Pulakos that he should receive appellants' property, prior to the filing of the Declaration of Taking, were sufficient circumstances to constitute *palpable bad faith.* Therefore, such a taking was beyond the power conferred upon the Authority by law." (Emphasis added.)

In that case, unlike the case at bar, the actions of the Authority when viewed as an integrated whole were demonstrative of bad faith. That the Authority did not offer the owners an opportunity for self-rehabilitation was only one of four factors that, considered together, was found to

constitute bad faith. This Court did not imply or state that a redevelopment authority had to offer self-rehabilitation in every case.

Referring to *Redevelopment Authority of the City of Erie v. Owners or Parties in Interest, supra,* 1 Pa. Commonwealth Ct. at 382, 274 A.2d at 246-47, therein it was also stated:

> "The proposal that was developed, with the help of a firm of expert planners, provided that appellants' property, the Pulakos property, and several other properties, be assembled to provide the needed land area for the construction of a downtown hotel. If this proposal had been followed, the appellants likely would not have had a basis to oppose the condemnation of their property because, as was said in *Schenck v. Pittsburgh,* 364 Pa. 31, 35-36, 70 A.2d 612, 614 (1950), '. . . in the absence of an indication that the Commission did not act in good faith or was wholly arbitrary in certifying the area designated by it as blighted, its certification to that effect is not subject to judicial review,' and, 'since [the Urban Redevelopment Law] gives the power of eminent domain to the Urban Redevelopment Authority, it is for that agency, and not for the courts, to determine whether or not the power should be exercised in this particular instance, . . .'"

Again in the case at bar there has been an affirmative finding that the Authority did not act in bad faith. A finding that it acted in good faith precludes this Court from scrutinizing the wisdom of the Authority's decision of exercising its power in this case.

Finally, the appellant argues that the appellee failed to obtain a written determination from the Secretary of Housing and Urban Development that the objectives of the urban

renewal plan could not be achieved through rehabilitation of the project area. The lower court in his charge on page 450a said that the Act[3] was substantially complied with and thus of no consequence. We agree.

The statute in question provides that the Secretary must determine that the objectives of the urban renewal plan cannot be achieved through rehabilitation of the project area before entering into a contract for a loan or capital grant for any project which provides for demolition and removal of buildings. Nowhere in the statute is it stated that this determination need be in writing. In the absence of proof to the contrary, the law presumes that a public official acted pursuant to proper authority and that he properly performed every duty and met every requirement necessary or essential to the validity of his official act. *McIntosh Road Materials Co. v. Woolworth*, 365 Pa. 190, 211, 74 A.2d 384, 394 (1950). Since the Secretary approved appellee's applications, it is presumed that he complied with the statute absent a showing to the contrary. No such showing has been made in the instant case.

Although neither of the parties has raised it as an issue, we deem it appropriate to comment on the propriety of the lower court in submitting the issues raised by the preliminary objections to a jury. In *Faranda Appeal, supra*, 420 Pa. at 302, 216 A.2d at 773, the Supreme court remanded to the lower court with directions that the lower court take testimony, by deposition or otherwise, and make a determination as to blight. Similarly, this Court in *Jacobs v. Nether Providence Township*, 6 Pa. Commonwealth Ct.

[3] 42 U.S.C. § 1460(c).

594, 599, 297 A.2d 550, 553 (1972), held that the trial court should resolve the issue of a *de facto* taking raised by preliminary objections, and not submit the issue to viewers. Accordingly, we cannot approve the procedure adopted in this case, harmless though it be.

The order of the lower court is affirmed.

JAMES S. BOWMAN,
President Judge.

APPENDIX C

Order of Supreme Court of Pennsylvania Denying Appeal, Filed April 3, 1974

THE SUPREME COURT OF PENNSYLVANIA

WESTERN DISTRICT

Sally Mrvos
Prothonotary

PITTSBURGH, PA.
15219

April 12, 1974

Lee C. McCandless, Esq.,
308 Mellon Bank Building,
Butler, Pa. 16001.

Re: Nixon Hotel, Inc. V. Redevelopment Authority of The City of Butler No. 557 Allocatur Docket

Dear Mr. McCandless:

This is to advise you that the Court has entered the following Order on your petition for allowance of appeal from the Order of the Commonwealth Court at No. 468 C.D. 1973 in the above-captioned matter:

"April 3, 1974

Petition Denied.

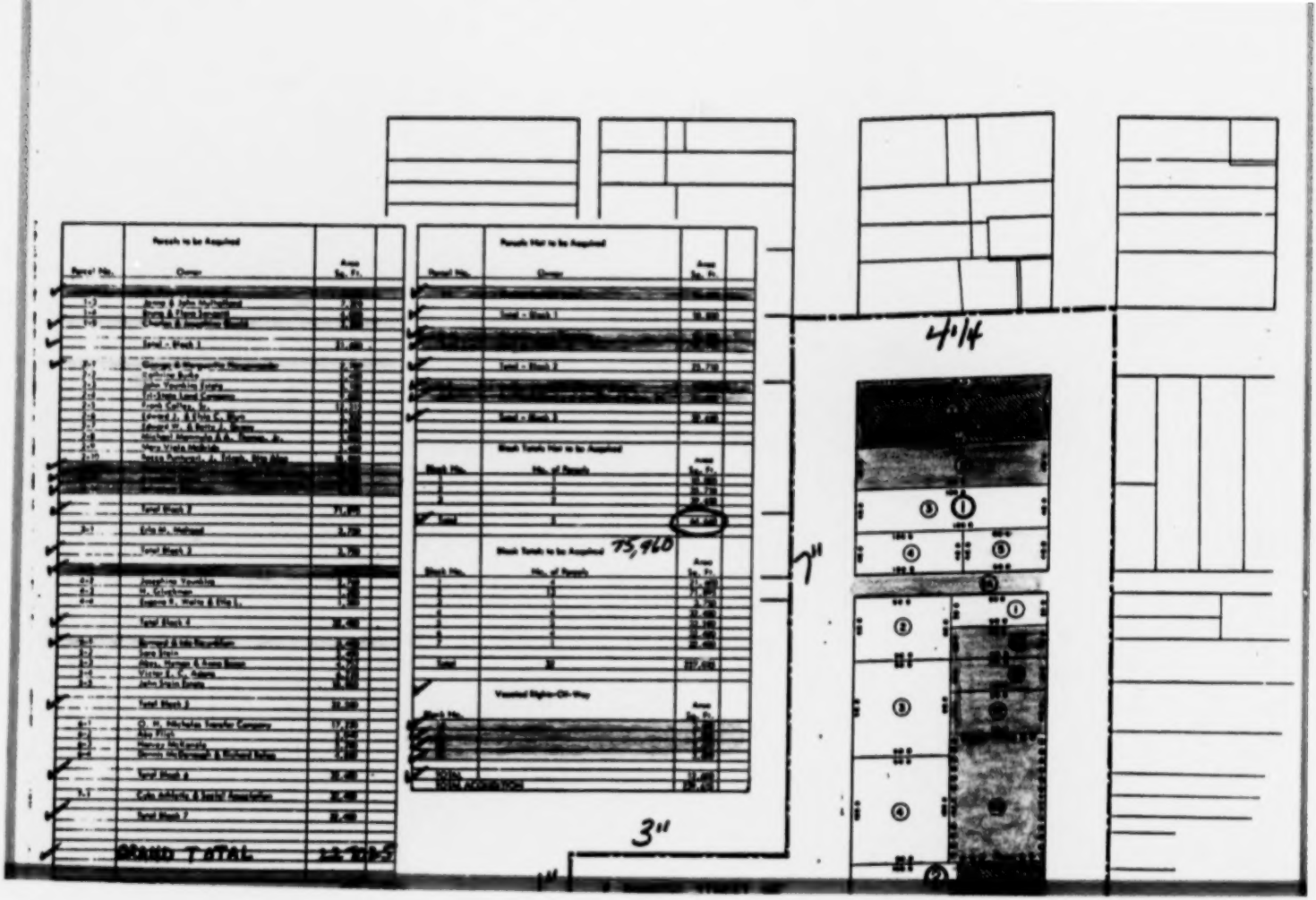
Per Curiam"

Very truly yours,

SALLY MRVOS
Prothonotary

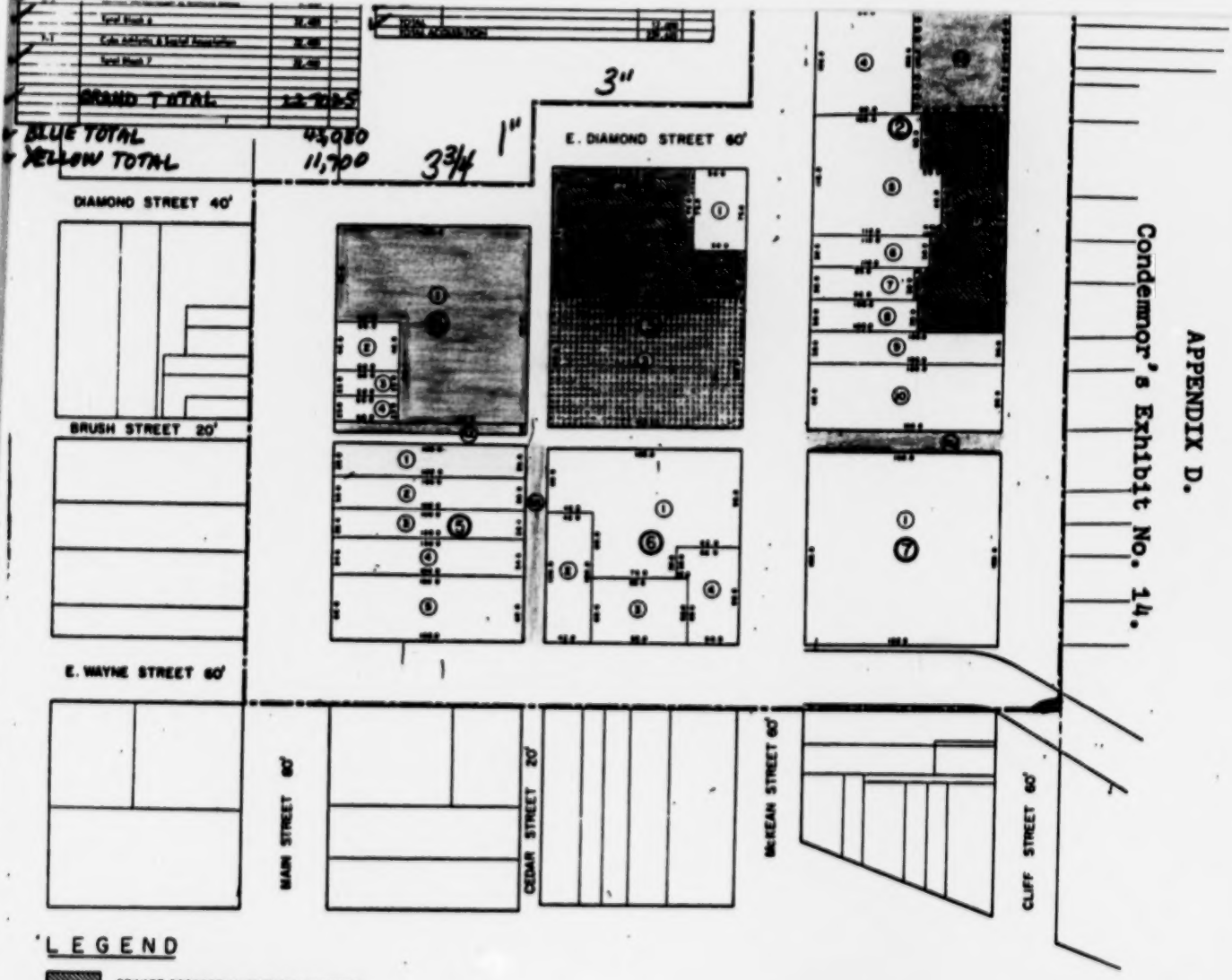
SM:ad

cc: Martin J. O'Brien, Esq.


4'14
7"
3"
75,960

APPENDIX D.

Condemnor's Exhibit No. 14.



LEGEND

- PRIVATE PROPERTY NOT TO BE ACQUIRED
- PRIVATE PROPERTY TO BE ACQUIRED
- PUBLIC PROPERTY NOT TO BE ACQUIRED
- SEVERED PARCEL NOT ACQUIRED
- PUBLIC RIGHTS OF WAY TO BE VACATED
- PROJECT AND CLEARANCE BOUNDARY

PROPERTY MAP CODE NO. R-222

SOUTH MAIN STREET URBAN RENEWAL AREA

Redevelopment Authority of the City of Butler Butler County, Pennsylvania

Simonds and Simonds · · Planning Consultants · · Pittsburgh, Pennsylvania

Project Area Map

- Public Property (34,200)
- Clearance to remove blighting influence (43,080)
- Clearance for planning reasons (11,300)
- Building structurally standard - to be retained (54,360)

JUL 26 1974

MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1974

No. 73-1949

NIXON HOTEL, INC.,

Petitioner,

vs.

REDEVELOPMENT AUTHORITY OF THE CITY OF BUTLER, PENNSYLVANIA,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE COMMONWEALTH OF PENNSYLVANIA

MARTIN J. O'BRIEN,
Attorney for Respondent.

507 Mellon Bank Building,
Butler, Pennsylvania 16001,
Phone: (412) 283-0710.

BATAVIA TIMES, APPELLATE COURT PRINTERS
EDWARD W. SHANNON—SENIOR REPRESENTATIVE
HAROLD L. BERKOBEN, REPRESENTATIVE
1701 PARKLINE DR., PITTSBURGH, PA. 15227
412-881-7483

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Questions Presented

1. Does this case present such special and important issues that the Court should assume jurisdiction?

2. Has the Respondent acting pursuant to the Pennsylvania Eminent Domain Code denied the Petitioner due process and equal protection of the law?

Argument

The grant of review on certiorari is discretionary and not a matter of right. The same should be granted only where special and important issues are presented. It is

respectfully submitted that such justification for certiorari is totally lacking in the instant case.

The Petitioner, Nixon Hotel, Inc., hereinafter called "Hotel" is a condemnee pursuant to a Declaration of Taking filed by the Respondent, Redevelopment Authority of the City of Butler, hereinafter called "Authority". The Hotel filed Preliminary Objections and contended therein that the Hotel was not a blighted property and further that the Authority had acted in bad faith, unreasonably, arbitrarily, capriciously, and discriminatorily. The Hotel set forth as a basis for these allegations that the Authority did not allow the Hotel voluntary self-rehabilitation and that certain properties were excluded but the Hotel was not excluded from acquisition and demolition. Initially the position of the Hotel was comparable to that of the condemnees in *Berman v. Parker*, 348 U. S. 26, 75 S. Ct. 98 and *Crawford v. Redevelopment Authority*, 211 A2d 866, 418 Pa. 549. Subsequently the Hotel was permitted to amend the Preliminary Objections and alleged the area was not blighted. The Court of Common Pleas of Butler County, on the demand of the Hotel, granted a trial by jury of the factual issues raised by these Preliminary Objections. This Petition results from that preliminary factual determination. The matter has now been in litigation four and one-half (4½) years and the Preliminary Objections are not yet resolved.

Two issues relied upon herein were specifically submitted to the jury for their determination. 1) Was the area blighted and 2) Did the Authority act in bad faith and capriciously. The jury verdict was in favor of the Authority. There is no overriding special or important issue raised by this Petition.

Was the Hotel afforded due process and equal protection of laws?

Historically, the Sovereign has inherently been vested with the right of Eminent Domain. In the United States, under the Fifth and Fourteenth Amendments to the Constitution, the individual is guaranteed that he shall not be deprived of his property without due process of law. The individual holds property subject to the Soverign's right of Eminent Domain. If that power is properly exercised pursuant to statutory authority and in compliance with established requisites, therefor it constitutes due process. *Hays v. Port of Seattle*, 251 U. S. 233, 64 L. Ed. 243, 40 S. Ct. 125.

The PENNSYLVANIA URBAN REDEVELOPMENT LAW 1945, May 24, P. L. 991, Section 12, 35 P. S. Section 1712, vests the power of Eminent Domain in the Redevelopment Authortiy of the City of Butler. All acts taken by the Authority have been in conformity with that Act and the PENNSYLVANIA EMINENT DOMAIN CODE 1964, Special Sess. June 22, P. L. 84, Article I, Section 101, 26 P. S. Section 1-101. The Petitioner questions whether the exercise of that power by the Authority complies with the fair play standards of due process and equal protection of the laws.

The Petitioner argues that the Authority acted in controvention of two legal requirements:

1) The project area was not blighted;
2) The Authority did not have in its possession a certificate personally signed by the Secretary of HUD that the objectives of renewal could not be achieved by rehabilitation.

The issue of blight was one of the major contentions by both parties throughout the trial. Evidence was presented

pro and con. The Hotel's principal argument was a mathematical calculation purporting to show that a certain per cent of the area was not blighted. The Trial Court properly instructed the jury that there was no mathematical formula to determine blight. The jury verdict was in favor of the Respondent. The Commonwealth Court did not discuss the matter. The Petitioner has never cited any authority to substantiate its argument.

The Petitioner persists in an erroneous statement of the law when he argues that the Federal Statute "requires the signature of the Secretary of HUD" on a certification that the objectives could not be achieved by rehabilitation. The law only requires that a determination of such be made by the Secretary. 42 USCA 1460(c). It does not set forth how that determination shall be evidenced. The Contract for Loan and Grant between the United States and the Authority indicates that all determinations were made by the Secretary when the Contract was executed. This Contract was signed on behalf of United States of America, Secretary of HUD by the Assistant Regional Administrator for Renewal Assistance.

The Secretary of HUD is specifically authorized by statute to delegate any of his functions, powers and duties. He may authorize such successive redelegations of such functions, powers and duties as he may deem desirable, and may make such rules and regulations as may be necessary to carry out his functions, powers and duties. 42 USCA 3535(d).

The Petitioner now relies on *U. S. v. Giordano*, 94 S. Ct. 1820, for the proposition that where a statute vests certain authority or responsibility in a particular executive official of government that such an official must personally per-

form or execute the subject function. Despite the fact that the trial record, complete with a detailed explanation and verification that the statutory determination was made, the Petitioner persists in the false assumption that because the Authority did not have in its possession a certificate personally signed by Secretary of HUD that the determination was not made. The Petitioner concedes this is a delegable duty under 42 USCA 3535(d).

In *U. S. v. Giordano*, the Court specifically noted that the Attorney General has authority to delegate the performance of any function of his office to subordinates. A major portion of the Court's Opinion is a detailed discussion of the legislative history and congressional intent on the specific limitations imposed on the Attorney General and any Assistant Attorney General he might designate to authorize the requisite application for a wiretap. The Court noted therein that the purpose of Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 82 Stat. 197, 211-225, 18 USC Sections 2510-2520, was to prohibit wiretapping and to impose criminal and civil penalties therefor. The exceptions allowed are the authorization for the Government's invasion of the individual's right of privacy. The Court pointed out that the Act is not as clear in some respects as it might be. Later, the Court concluded from the scheme of the Act and the detailed legislative history and not from the language of the law that to construe it to permit the Attorney General to delegate his authority at will is contrary to the expressed congressional intent.

The Petitioner cites *Western Addition Community Organization v. Romney*, 320 F. Supp. 308 (1969). Therein the Secretary, unlike the instant case, never made any de-

termination one way or the other. Then one year after the local agency submitted the plan, the Secretary of HUD made what purported to be an expression of satisfaction with the local agency's assurance. The Court found it really to be a letter of dissatisfaction. In the Western Addition Case the Court specifically noted that the later action by the Secretary of HUD, then Robert Weaver, was taken by him acting through his Regional Administrator. In the case at hand, the Assistant Regional Administrator executed the necessary determination. There is no evidence in this case that the Authority acted in any manner except in compliance with all statutory requirements. As a result thereof, the Loan and Grant Contract in the amount of 1.4 Million Dollars was carried out.

Finally, the Petitioner argues that the Authority did not acquire all properties in the project area. Therefore, the Petitioner should have the right to retain his property and be allowed "self-rehabilitation," whatever that is. From *Berman v. Parker, id.* to *Leo Realty Co. v. Redevelopment Authority*, etc., a Pa. Cmwlth. Ct. Case reported at 320 A2d 149, decided June 4, 1974, it has been consistently held that a building which may be structurally sound or innocuous may be taken by eminent domain where the authority did not act in bad faith. Further, in *Berman v. Parker*, this Court said it was not "the function of the Court to sort and choose from among the various parcels selected for condemnation."

The evidence in this case indicates that there was no property in the project area which was the beneficiary of a rehabilitation program. There is no evidence whatsoever of bad faith on the part of any member of the Redevelopment Authority. The Petitioner is seeking preferential treatment, *ie.*, "self-rehabilitation."

The Redevelopment Authority of the City of Butler has acted solely in the regular course of administration, according to the proscribed forms and in accord with the general rules for the protection of the condemnee's rights.

Summary

This Court should not assume jurisdiction to review the refusal of the Supreme Court of Pennsylvania to hear the Appeal from the Commonwealth Court. There is no overriding special or important issue presented in this Petition. The Authority did not depart from accepted and usual course of proceedings so as to treat the Hotel in an unfair manner in this condemnation. This Petition raises only the issue of denial of due process and equal protection of laws based on the allegations of bad faith and arbitrary and capricious actions by the Authority. Both issues were submitted to a jury as the trier of fact and a verdict on the same was rendered in favor of the Authority. Certiorari should be denied.

Respectfully submitted,

MARTIN J. O'BRIEN,
Attorney for Respondent.